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8 UNITED STATES DISTRICT COURT  
9 Northern District of California  
10 San Francisco Division

11 BRYAN ANDREWS, No. C 12-04614 LB  
12 Plaintiff, ORDER GRANTING DEFENDANTS'  
13 v. SUMMARY JUDGMENT MOTION  
14 CITY OF BERKELEY, *et al.*, [ECF No. 62]  
15 Defendants.  
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INTRODUCTION

18 Mr. Andrews, with the assistance of counsel, sued Berkeley police officers in this 42 U.S.C.  
19 § 1983 action for wrongful arrest and excessive force in violation of the Fourth Amendment. *See*  
20 Complaint, ECF No. 20. He now represents himself. *See* 3/6/13 Order, ECF No. 19. The claim  
21 stems from his encounter with the police on September 2, 2010, after he called 911, saying that he  
22 was being robbed, and thereafter was placed into protective custody under California Welfare and  
23 Institutions Code section 5150. Defendants move for summary judgment and served Mr. Andrews.  
24 Despite being advised of the requirements for a summary judgment motion, and – in several  
25 previous orders to show cause – of the consequences of not prosecuting his case, *see, e.g.*, ECF Nos.  
26 37, 43, 54, 59, and 60, Mr. Andrews has not opposed the summary judgment motion. Pursuant to  
27 Civil Local Rule 7-1(b), the court finds this matter suitable for determination without oral argument  
28 and vacates the June 18, 2014 hearing. For the reasons discussed below, the court grants the motion

1 for summary judgment.

## 2 ANALYSIS

### 3 I. LEGAL STANDARD

4 The court must grant a motion for summary judgment if the movant shows that there is no  
5 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of  
6 law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material  
7 facts are those that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute about  
8 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for  
9 the non-moving party. *Id.* at 248-49.

10 The party moving for summary judgment bears the initial burden of informing the court of the  
11 basis for the motion, and identifying portions of the pleadings, depositions, answers to  
12 interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material  
13 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the moving party  
14 must either produce evidence negating an essential element of the nonmoving party’s claim or  
15 defense or show that the nonmoving party does not have enough evidence of an essential element to  
16 carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*  
17 *Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Devereaux v. Abbey*, 263 F.3d 1070, 1076  
18 (9th Cir. 2001) (“When the nonmoving party has the burden of proof at trial, the moving party need  
19 only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”)  
20 (quoting *Celotex*, 477 U.S. at 325).

21 If the moving party meets its initial burden, the burden shifts to the non-moving party to produce  
22 evidence supporting its claims or defenses. *Nissan Fire & Marine Ins. Co., Ltd.*, 210 F.3d at 1103.  
23 The non-moving party may not rest upon mere allegations or denials of the adverse party’s evidence,  
24 but instead must produce admissible evidence that shows there is a genuine issue of material fact for  
25 trial. *See Devereaux*, 263 F.3d at 1076. If the non-moving party does not produce evidence to show  
26 a genuine issue of material fact, the moving party is entitled to summary judgment. *See Celotex*, 477  
27 U.S. at 323.

28 In ruling on a motion for summary judgment, inferences drawn from the underlying facts are

1 viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith*  
2 *Radio Corp.*, 475 U.S. 574, 587 (1986).

## 3 II. PLAINTIFF'S SECTION 1983 CLAIM

4 The motion for summary judgment is unopposed. A district court may not grant a motion for  
5 summary judgment solely because the opposing party has failed to file an opposition. *Cristobal v.*  
6 *Siegel*, 26 F.3d 1488, 1494–95, n.4 (9th Cir. 1994) (unopposed motion may be granted only  
7 after court determines that there are no material issues of fact). The court may, however, grant an  
8 unopposed motion for summary judgment if the movant's papers are themselves sufficient to support  
9 the motion and do not on their face reveal a genuine issue of material fact. See *United States v. Real*  
10 *Property at Incline Village*, 47 F.3d 1511, 1520 (9th Cir. 1995) (local rule cannot mandate automatic  
11 entry of judgment for moving party without consideration of whether motion and supporting papers  
12 satisfy Fed. R. Civ. P. 56), *rev'd on other grounds sub nom. Degen v. United States*, 517 U.S. 820  
13 (1996).

14 To state a claim under § 1983, a plaintiff must allege: (1) the conduct complained of was  
15 committed by a person acting under color of state law; and (2) the conduct violated a right secured  
16 by the Constitution or laws of the United States. See *West v. Atkins*, 487 U.S. 42, 48 (1988). It is  
17 undisputed that the police officers were acting under color of state law, and Mr. Andrews's claim is  
18 that the officers violated his Fourth Amendment right to be free from unreasonable searches and  
19 seizures and excessive force under the Fourth Amendment.. Thus, the issue before the court is  
20 whether the force used during his seizure was “objectively reasonable.” *Arpin v. Santa Clara Valley*  
21 *Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001) (citing *Graham v. Connor*, 490 U.S. 386, 388  
22 (1989)).

23 “Determining whether the force used to effect a particular seizure is reasonable under the Fourth  
24 Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s  
25 Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*,  
26 490 U.S. at 396 (internal citations and quotations omitted). To do so, a court must evaluate “the  
27 facts and circumstances of each particular case, including [(1)] the severity of the crime at issue,  
28 [(2)] whether the suspect poses an immediate threat to the safety of the officers or others, and [(3)]

1 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* (citing *Tennessee*  
2 *v. Garner*, 471 U.S. 1, 8-9 (1985)).

3 The papers in support of the motion for summary judgment show that the Berkeley police acted  
4 appropriately when taking Mr. Andrews into protective custody and used a reasonable amount of  
5 force under the Fourth Amendment. Mr. Andrews called 911, saying that he was being robbed near  
6 Blondie’s Pizza in Berkeley. Police officers responded, but Mr. Andrews spoke in a confused,  
7 unintelligible, and delusional manner, and he was sweating profusely even though it was about 60  
8 degrees outside. Officers determined that he should be taken into protective custody, and he tried to  
9 run. Thereafter, officers took him to the ground, handcuffed him, and transported him to the  
10 hospital. No one struck Mr. Andrews at any time, but because he continued to resist, they had to  
11 restrain him with a protective WRAP. *See* Orebic Decl. ¶ 2, Ex. A (911 calls); Jung Decl. ¶¶ 4-11;  
12 Lathrop Decl. ¶ 7. There are poorly-lit videos of the incident from a bystander’s cell phone. Orebic  
13 Decl. Ex. E (the videos). The officers sound calm and there is no suggestion of unreasonable force.

14 During his deposition, Mr. Andrews confirmed that it was his voice on the 911 call. He has no  
15 recollection of calling 911, the alleged robbery, talking with the officers, or resisting them. Andrews  
16 Dep., Orebic Decl. Ex. B at 57-61, 69. He testified that during the two-hour period before the  
17 incident, he consumed four drinks of hard alcohol of two to four ounces of alcohol each, smoked  
18 marijuana, and might have smoked cocaine mixed in with the marijuana since he did not roll the  
19 “blunt” himself. *Id.* at 31, 40, 42, 102-03

20 The hospital records (which Defendants submitted with the appropriate custodial declarations)  
21 show that when he arrived at Alta Bates, Mr. Andrews was “disoriented or irrational” and  
22 “aggressive or violent” such that he was placing himself or others in danger. Orebic Decl. Ex. C-1.  
23 He was restrained and held in protective custody under Welfare and Institutions Code section 5150.  
24 He could not follow verbal directions. *Id.* He was transferred to Kaiser, where he was diagnosed  
25 with acute cocaine intoxication and being in an agitated delirium and admitted to the hospital for the  
26 condition, which apparently caused acute kidney failure. Orebic Decl. Ex. C-2. The chart says that  
27 he told the doctor the next day that he snorts cocaine, and the doctor explained that the patient  
28 became “agitated with delusions and paranoia when intoxicated with cocaine.” *Id.* Plaintiff

1 admitted that he “can’t recall details of what happened last night.” *Id.* The doctor lifted the 5150  
2 hold and explained the risks of cocaine including renal failure. *Id.* Defendants point out that the  
3 same thing happened two years later, when Mr. Andrews was again taken into protective custody  
4 and admitted to the hospital with acute cocaine intoxication and delirium, and it took six days to  
5 stabilize him. Orebic Decl. Ex. D; Jung Decl. ¶ 6.

6 Plaintiff contends that the handcuffs caused cuts and abrasions on his wrists, but he admits that  
7 he does not know if he was injured from forcefully pulling on the handcuffs when cuffed to a gurney  
8 at the hospital. Andrews Dep., Orebic Decl. Ex. B at 74, 78.

9 Under the totality of the circumstances, the police had probable cause to take Andrews into  
10 protective custody. Indeed, as the Berkeley City Attorney remarked at a hearing, it is likely that by  
11 doing so, they saved Mr. Andrews’s life. Moreover, given Mr. Andrews’s struggling to get away,  
12 the force used was reasonable.

13 Mr. Andrews also claims in the complaint that the force was excessive in violation of the 14th  
14 Amendment. The Fourteenth Amendment’s substantive due process clause protects against the  
15 arbitrary or oppressive exercise of government power. *See County of Sacramento v. Lewis*, 523 U.S.  
16 833, 845-46 (1998). “[T]he Due Process Clause is violated by executive action only when it can be  
17 properly characterized as arbitrary, or conscience shocking, in a constitutional sense.” *Id.* at 845-47;  
18 *see Lemire v. Cal. Dept. Of Corrections & Rehabilitation*, 726 F.3d 1062, 1075 (9th Cir. 2013). The  
19 cognizable level of executive abuse of power is that which “shocks the conscience” or “violates the  
20 decencies of civilized conduct.” *Lewis*, 523 U.S. at 846. Mere negligence or liability grounded in  
21 tort does not meet the standard for a substantive due process decision. *Id.* at 849. Where a law  
22 enforcement officer makes a snap judgment because of an escalating situation, his conduct may be  
23 found to shock the conscience only if he acts with a purpose to harm unrelated to legitimate law  
24 enforcement objectives.” *Hayes v. County of San Diego*, 736 F.3d 1223, 1230 (9th Cir. 2013) (citing  
25 *Wilkinson*, 610 F.3d at 554). The summary judgment papers establish that the police officers’  
26 conduct did not violate the Fourteenth Amendment.

27 Finally, the complaint also alleges an Equal Protection violation. There is no evidence of any  
28 discrimination against Mr. Andrews. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432,

1 439 (Equal Protection Clause requires that “all persons similarly situated should be treated alike”).  
2 In sum, Defendants’ unopposed summary judgment papers establish that they did not violate Mr.  
3 Andrews’s rights, and there is no genuine issue of material fact evident from the papers or the record  
4 otherwise before the court.

5 **CONCLUSION**

6 The court grants Defendants’ motion for summary judgment.

7 This disposes of ECF No. 62. The clerk of the court shall close the file.

8 **IT IS SO ORDERED.**

9 Dated: June 12, 2014



LAUREL BEELER  
United States Magistrate Judge